

How dangerous is Emmanuel Macron – really?

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To what extent does Emmanuel Macron represent a risk for civil liberties in France? The question may seem ill-posed, ill-suited, brought up before it could even be due. Does he not have a right to enjoy a certain period of good will on behalf of his constituents and professional observers? Is there no "*état de grâce*"?

In his case, even before the presidential elections in April and May, left-wing intellectuals and adherents to the Bourdieu strand of sociology had warned against what they saw as the [looming rise of authoritarianism in French politics](#). They seemed to have a point as far as Macron's proclaimed political philosophy was concerned, a strange mix of Girondist liberalism and extremely centralizing Gaullist presidentialism, with an increasing emphasis on the latter. This warning, as much as it seemed far-fetched and paranoid to some, may prove to be prescient sooner than the Kassandras themselves may have expected.

The daily Le Monde got [exclusive information](#) on a project of law on far-reaching anti-terrorism measures that would amount to a "trivializing" or a normalization of the state of exception that has reigned in France ever since the jihadist attacks of November 15, 2015. It would write into the ordinary law rules that were designed for the undeclared state of war in Algeria in 1955 and that were made use of only on several extraordinary occasions, well-limited in time and reach: the peak of the crisis in Algeria, an independence movement in New Caledonia, the rebellion of the banlieues in 2005 and, finally, the second major Islamist attack in 2015 (on the state of exception in France see [here](#) and [here](#)). That is all the more worrying because it prolongs a far too long and ultimately ineffective period of "*état d'urgence*" – all the decisive breakthroughs in the investigations were made under ordinary law, not the provisions of the law of 1955.

Generally, the current state of exception was remarkable for its abuses from the very beginning: It was used against leftist and ecologist protesters in 2015 (COP 21) and 2016 (labour market reforms). Its highly vague and poorly checked provisions led to a stunningly high number of ex-post judicial condemnations of the police and administration. Practices like "*assignation à résidence*" (curfew order, house detention without warrant) and "*perquisition administrative*" (search of one's home without warrant) opened the door to multiple abuses of police power. The philosophy of the law of 1955 is primarily marked by its prioritizing of executive expediency over judicial checks. Horizontal separation of powers is temporarily suspended in favour of a vertical control of the lower ranks by the higher ranks of the executive. This mistrust of the "least dangerous branch", the judiciary, is nothing new in French political history. It goes back to 17th century absolutism and reached an early climax in the French Revolution with its cult of the "*loi sacrée*", the principled preference for the legislative branch.

Therefore, the main worry constitutionalists should have about the recent developments concerns the shift from the priority of the legislative to the executive branch. In contrast to the favorable view of the legislature and the parliamentary law, an unchecked executive is not in line with honourable French revolutionary traditions. It is rather the local expression of the global trend to executive security regimes that emancipate themselves from parliamentary and judicial control alike, under the pretext that globalization, allegedly more open borders and multiculturalism lead to security risks of a new dimension.

The trend is accentuated by the ongoing shift of France's political system from an institutionally entrenched left-right dichotomy, with a strong government that is faced with a comparably strong opposition, to an even more presidentialist system with a hegemonic party of the "extreme centre". The parliamentary elections (second round) of 18 June signal a seismic shift to a system of allegedly unideological, "reasonable" government – or governance?! –, "*le bon gouvernement*" (Pierre Rosanvallon). In the presence of the extremist threat of the Front National, the opposition of left and right seemed occasionally outdated. However, it is extremely important to distinguish between

left and right as coordinates of political orientation and left and right as designators of traditional party blocs. While the latter are in fact quite obsolete in France for the moment, the former cannot but remain vital for every democracy: because every political decision can be analyzed through the lens of whether it serves equality (in the widest sense) or not. Macron's rule will soon prove to be more "leftist" or more "rightist" in this regard. And in the *Assemblée nationale*, inside his own party *La République en marche* (LRM), the traditional opposition of left and right will resurface. For it is certainly wrong that the voters in Belleville and Versailles, despite their current common preference for LRM, all of a sudden share the same aspirations for the country.

Against this background of looming one-party hegemony and executive overreach, especially in security matters, the *Conseil constitutionnel*, the French Constitutional Council, found it [wise to remind the government of the limits of its police powers](#). For the first time, on June 9, the *Conseil* declared a part of the law of 1955 unconstitutional. In fact, the case before the *Conseil* was an exemplary illustration of the abuses of the *état d'urgence*. It showed again that it was a doubtful choice not to restrict the measures of the state of exception to the reasons that prompted it in the first place – namely Islamist terror – on constitutional grounds. Instead, the state of exception is totally indiscriminate in its application – a fatal trait that the courts have been silent on, including the *Conseil* constitutionnel in its latest decision.

Once more, the *état d'urgence* had targeted leftist political activists in case *n° 2017-635 QPC – M. Émile L.* The 20-year old plaintiff had been stopped and searched by the police in June 2016 while a demonstration was going on nearby, in which he had no intent to participate. The police found a knife that he had used for a pique-nique the day before and forbade him to take part in protests that were to take place June 28 in Paris as part of the movement against labour market reforms of the government. Apparently, the police saw him as part of the radical left, which has been targeted by the police time and again since November 2015, particularly in the left-leaning university towns of Paris, Nantes and Rennes. Prohibitions to take part in political demonstrations are highly unusual in France and are only legal under the state of exception. Quite naturally, these prohibitions have never been used to go against Islamist terrorism. Instead, hundreds of exclusion orders or bans on staying were issued against left-wing activists during the last 20 months, thus serving as individual prohibitions to protest in disguise.

According to the section of the law under scrutiny, (3° art. 5), the *préfet*, a regional president of the police, has the power to issue a ban on staying in a (hardly defined) area against everyone who seeks to hinder public authorities in their work in any possible way – the French verb is "*entraver*", an extremely broad and therefore vague term for "to impede, to interfere, to hinder, to obstruct".

The *Conseil* finds the wording of the law too broad and therefore in violation of the constitutional liberty to free movement (*liberté d'aller et venir*) and the constitutional protection of family life (*droit de mener une vie familiale normale*). That is because the law does not call for "*la prévention d'une atteinte à l'ordre public*", the intention of the authorities to prevent a violation of public order. One could say that the *Conseil* demands the minimum rule of law safeguards by replacing an unlimited term by a slightly more defined term that has the merit of actually being a legal term ("*atteindre*" instead of "*entraver*"). In a typical move, the *Conseil* says that it misses the proper balancing of the protection of public order and constitutional freedoms. What it demands from the legislature is usually nothing more than a slight hint that the conflict of constitutional positions has been seen and resolved. It does not demand a more determined or even proportional protection of liberty, US- or German-style.

Secondly, the *Conseil* states that the law contains no further spatial and temporal conditions or guarantees, which enables authorities to include the workplace or even the home of the person concerned in the prohibited area. That is considered excessive as well.

What are the immediate consequences of the decision? On the one hand, not many. The government plans to extend the duration of the state of exception until after July 15, probably for another six months. It will have to change the words of the law of 1955 to which the law of extension will refer. There are no plans to include the "*interdiction de séjour*" in the new anti-terrorism law anyway.

On the other hand, political protests – almost inevitable against the backdrop of Macron’s socio-economic reform programme – will be harder to curtail.

There are even more reasons to hope: First, the government wants to limit its "*banalisation*" of the state of exception to the fight against terrorism. Political liberty will recover.

Second, the *Conseil constitutionnel* has shed its legendary restraint, especially in questions of security legislation. Does that mark a new beginning under the auspices of hegemonic centrist rule?

Third, even on this election night itself, June 18, the incoming leader of the stronger than expected far-left opposition, Jean-Luc Mélenchon, announced his intention to fight off further curtailments of civil liberties. That is an important announcement because it was the Assemblée nationale that did a remarkably good job at monitoring the *état d'urgence* during the last year. Even if it has had a limited impact on extensions and tightenings of the rules governing the state of exception, it has proven to be the branch that the French people can still often count on to preserve their liberties against executive overreach.

Thanks to the new deputies, Macron will probably prove to be less dangerous than some had feared.

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